BRB No. 09-0707 BLA

LARRY PEGG, Deceased	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/29/2010
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant

Ashley M. Harmon (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (2004-BLA-05226) of Administrative Law Judge Pamela Lakes Wood rendered on a miner's

claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for the second time. In her initial decision, the administrative law judge credited claimant with thirty-two years of coal mine employment, based on the parties' stipulation, and adjudicated this claim, filed on July 8, 2002, pursuant to the regulations contained in 20 C.F.R. Part 718.[2] She found the existence of both clinical and legal pneumoconiosis arising out of coal mine employment established under 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), and total respiratory disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), (c). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's finding that the weight of the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis under Section 20 C.F.R. §718.202(a)(1), and affirmed, as unchallenged, her length of coal mine employment determination and her finding of total disability at Section 718.204(b), but vacated her award of benefits and remanded the case for further consideration. *L.P.* [*Pegg*] *v. Consolidation Coal Co.*, BRB No. 08-0131 BLA (Oct. 29, 2008) (unpub.). Initially, the Board held that the administrative law judge erred in finding that Dr. Fino's readings of the June 7, 2004 and February 5, 2005 CT scans were inadmissible and, consequently, erred in discrediting Dr. Fino's opinion on the ground that he relied upon inadmissible evidence. The Board therefore vacated her finding that the medical opinions of record established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), and instructed the administrative law judge on remand to admit and consider the CT scan interpretations rendered by Dr. Fino, and to reconsider his

[1] By Order dated April 9, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Black Lung Benefits Act with respect to the entitlement criteria for certain claims. *Pegg v. Consolidation Coal Co.*, BRB No. 09-0707 BLA (Apr. 9, 2010)(unpub. Order). Claimant, employer, and the Director, Office of Workers' Compensation Programs, have responded in agreement that the amendments are not applicable to this claim, because it was filed prior to January 1, 2005.

[2] Claimant died on May 31, 2010, and employer subsequently filed a motion for remand to the district director for the development of evidence and further proceedings. Claimant's counsel responded in opposition to employer's motion for remand, noting that this case involves a miner's claim for benefits, not a survivor's claim, and that the record has been closed for many years. On June 20, 2010, claimant's widow, Judith A. Pegg, advised the district director that she wished to pursue the miner's claim for benefits on his behalf. Consequently, we deny employer's motion for remand.

opinion. Next, the Board agreed with employer that the administrative law judge selectively analyzed the relevant medical opinions in the following respects. First, the administrative law judge discounted the medical opinions of Drs. Fino and Altmeyer because they relied upon evidence that was not properly of record, but she did not similarly accord diminished weight to Dr. Lenkey's opinion despite noting that he relied, in part, upon a November 2005 pulmonary function study that was not of record to diagnose a mixed obstructive and restrictive impairment. Next, although the February 23, 2005 pulmonary function study was found to be non-conforming, the administrative law judge did not address whether this factor affected the credibility of Dr. Lenkey's opinion, which relied, in part, on this pulmonary function study to diagnose an obstructive impairment.[3] Further, while the administrative law judge discredited Dr. Fino's opinion on the ground that the physician altered his conclusion as to the presence of fibrosis in claimant's lungs after he viewed a more recent CT scan, she failed to consider the significance of the fact that Dr. Lenkey's opinion regarding the nature of claimant's respiratory impairment, and the extent to which coal dust exposure contributed to it, had varied over time. Similarly, the administrative law judge failed to explain her determination that Dr. Saludes's opinion was well-reasoned, despite noting that Dr. Saludes characterized his assessment of the extent to which coal dust exposure contributed to claimant's obstructive lung disease as an "educated guess." *Pegg*, slip op. at 8. Lastly, the Board held that the administrative law judge erred in discrediting the opinions of Drs. Fino and Altmeyer at Section 718.202(a)(4) based, in part, upon her finding that the x-ray evidence was sufficient to establish clinical pneumoconiosis at Section 718.202(a)(1). The Board explained that, while the administrative law judge determined correctly that the negative x-ray interpretations made by Drs. Fino and Altmeyer were not admissible, she failed to consider the significance of the fact that these negative readings were consistent with the interpretations of record submitted by employer, nor did she acknowledge that she had determined that three of the four films of record, including those interpreted by Drs. Fino and Altmeyer, were in equipoise and, therefore, neither supported not undermined a finding of pneumoconiosis. Additionally,

[3] As an additional matter, the Board addressed the administrative law judge's determinations that the qualifying February 23, 2005 pulmonary function study (PFS) did not meet the quality standards in 20 C.F.R. §718.103 and Appendix B to Part 718, and that a typographical error indicated that the miner was female instead of male. The Board therefore instructed her to determine on remand whether evidence in the record established that the wrong predicted values were used so as to affect the probative value of Dr. Lenkey's opinion. *L.P.* [*Pegg*] *v. Consolidation Coal Co.*, BRB No. 08-0131 BLA, slip op. at 7, 8 at n.7 (Oct. 29, 2008) (unpub.). On remand, the administrative law judge found no evidence that the wrong values were used, and stated that "the undisputed failure to comply with the quality standards is of far more significance." Decision and Order on Remand at 5, n.6.

in light of its decision to vacate the administrative law judge's determination that claimant established the existence of both clinical and legal pneumoconiosis at Section 718.202(a)(4), the Board vacated her findings with respect to the issue of disability causation at Section 718.204(c), and remanded the case for further findings. *Pegg*, slip op. at 8-10.

On remand, the administrative law judge again found that the weight of the evidence established both clinical and legal pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b) and disability causation pursuant to Section 718.204(c). Consequently, she awarded benefits.

In the present appeal, employer contends that the administrative law judge failed to follow the Board's specific instructions on remand, and challenges her findings of clinical and legal pneumoconiosis under Section 718.202(a), and disability causation at Section 718.204(c). Claimant responds, urging that the award of benefits be affirmed, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs, has stated that he will not submit a substantive response unless requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, employer contends that the administrative law judge failed to comply with the Board's remand instructions, and challenges her consideration of the evidence. First, employer reiterates its objections to the administrative law judge's determination not to admit and consider Dr. Fino's CT scan readings, and to reconsider the evidence. Specifically, employer submits that the administrative law judge failed to comply with the Board's holding that she "was incorrect in excluding Dr. Fino's CT scan interpretations [of June 7, 2004 and February 2, 2005] and in discrediting Dr. Fino's opinion on the ground that he relied on inadmissible evidence." *Pegg*, slip op. at 6-7; Employer's Brief at 2, 6-8.[4] Further, employer argues that the administrative law judge's

[4] The Board stated, in relevant part:

> [t]he record contains CT scans dated June 7, 2004 and February 2, 2005. The administrative law judge admitted the "CT scan hospital reports from 2004 and 2005 (attached as exhibits to Dr. Lenkey's May 15, 2006 deposition)." As the Director notes, in accordance with *Webber* [*v. Peabody Coal Co.*, 23 BLR 1-123 (2006), *aff'd on recon.*, 24 BLR 1-1

determination to again discredit the assessments of Dr. Fino and Altmeyer based, in part, on her finding that the x-ray evidence established clinical pneumoconiosis, is contrary to the Board's instructions. Employer also argues that the administrative law judge again selectively analyzed the evidence, and erred in her evaluation of the medical opinions. Consequently, employer submits that that her finding of the existence of pneumoconiosis under Section 718.202(a)(4) is flawed, thereby invalidating her findings on the issue of disability causation at Section 718.204(c). We agree.

In her decision on remand, the administrative law judge began by acknowledging the Board's instruction as follows:

> The Board found that I had incorrectly determined that Dr. Fino's CT scan readings were inadmissible and in discrediting his opinion in part on that basis. . . .The Board is quite correct: what I had meant to say is not that the CT scan interpretations were not admissible but that they were not admitted. . . . Dr. Fino relied upon something that was not in the record, apart from his discussion of his interpretations at one of his depositions.…I do not read *Webber* (citation omitted) as undermining the authority of an administrative law judge to conduct a hearing in an orderly manner and to close the hearing record within her discretion….Notably, neither party listed CT scan interpretations on their evidence designation forms and this matter only arose because employer complained that claimant had submitted the medical opinion of his treating physician, Dr. Lenkey, on the eve of the 20-day rule set forth in 20 C.F.R. §725.456(a)(2)…. In a motion filed prior to the hearing and reasserted at the hearing, Employer sought to respond to the testing upon which that opinion was based, which was not

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> (2007)(*en banc*)], each party was allowed to submit one affirmative reading of each of these CT scans, and one rebuttal reading, as necessary, to respond to the opposing party's affirmative reading. Thus, Dr. Fino's readings of the June 7, 2004 and February 2, 2005 CT scans were admissible. Because the administrative law judge was incorrect in excluding Dr. Fino's CT scan interpretations and in discrediting Dr. Fino's opinion on the ground that he relied upon inadmissible evidence, we must vacate her finding that the medical opinions of record were sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge for the admission and consideration of the CT scan interpretations rendered by Dr. Fino and for reconsideration of Dr. Fino's opinion.

Pegg, slip op. at 7.

> included with the report (but which was part of the claimant's treatment records) and moved for the record to be kept open for that purpose.

Decision and Order on Remand at 2.

Next, the administrative law judge explained that claimant's evidence included a December 19, 2005 opinion from Dr. Lenkey, which referenced findings relating to a June 7, 2004 CT scan, that was neither of record nor designated by the parties. *Id*. at 2-3. She related:

> Thus, at the hearing, I directed the claimant to submit the treatment records referenced by Dr. Lenkey and allowed additional depositions of the experts to be taken, and I left the record open for those limited purposes; I did not, however, provide for the CT scans to be reread in rebuttal to the medical records and specifically denied that request by employer's counsel. (Hearing Transcript at 44). By directing Dr. Fino to interpret the CT scans on his own, when the record was not left open for that purpose, employer acted in violation of my ruling at the hearing and in contravention for the limited purpose for which the record was left open. (Hearing Transcript at 31-45). Nevertheless, the Board has essentially accepted a collateral attack on my opinion on that basis.

Id. at 3.

The administrative law judge stated further that: "employer did not seek reconsideration of that ruling…It simply ignored it, directing its expert to review the CT scans in contravention of my ruling, and sought to second-guess my ruling on appeal. Yet the Board now holds that employer had a 'right to submit Dr. Fino's CT scan readings'." *Id*. at 3 n.2. She concluded:

> Putting that matter aside, there is absolutely no basis in the record for determining that Dr. Fino is more qualified to interpret CT scans than the radiologist who did so for treatment purposes (Dr. Kelby Frame), upon which Dr. Lenkey relied. I agree with Claimant that "Dr. Fino's testimony about his own readings of the two CT scans does not significantly add to the credibility of his opinion or lessen the credibility of Dr. Lenkey's opinion." Claimant's Brief at 15-16.

Id. at 3.

Accordingly, as employer asserts, the administrative law judge disagreed with the Board's instructions; indeed, she stated that "many of the Board's rulings relate to

matters taken out of context."[5] *Id*. at 1, 4. With respect to the CT scans, she sought to clarify her prior ruling by asserting that she had meant that the CT scans were *not admitted*, rather than that they were *not admissible*; she stated further that neither the record nor Dr. Fino's testimony indicated that his interpretation of the CT scans merited greater weight than the interpretation provided by the treating radiologist, Dr. Frame. *Id*. at 2-3. She next addressed the Board's determination that she had selectively analyzed the medical opinions of Drs. Fino and Altmeyer, in comparison to that of Dr. Lenkey, and referenced her prior findings in support of her current finding on remand that the preponderance of the medical evidence establishes both clinical and legal pneumoconiosis, as well as briefly relating her findings in light of the Board's remand instructions. *Id*. at 4-6. The administrative law judge then found, summarily, that the evidence established that claimant's pneumoconiosis arose out of his coal mine employment and was a substantially contributing cause of his total disability, at Sections 718.203(b), 718.204(c), and awarded benefits. *Id*. at 6-7.

We agree with employer that the administrative law judge has failed to comply with the Board's specific instructions in remanding this case. Although the administrative law judge asserts that she meant to say that the CT scans were not admitted into the record, rather than that they were inadmissible, she has nonetheless failed to comply with the Board's binding appellate directives to admit the CT scans, reconsider the evidence and render new findings, in accordance with our assignments of error. *See Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988). In view of the administrative law judge's failure to do so, her alternative findings, *i.e*., that the record fails to demonstrate superior interpretive qualifications on the part of Dr. Fino, and her adoption of claimant's assessment of the probative value of Dr. Fino's related testimony, cannot be affirmed, as the Board is unable to discern whether her analysis on the merits is improperly selective or tailored to her previous rationale. We therefore vacate her findings under Sections 718.202(a)(4), 718.203(b), and 718.204(c), and remand this case to the administrative law judge to comply with the Board's previous instructions to admit and consider Dr. Fino's CT scan interpretations, and to reconsider Dr. Fino's opinion in light of the factors specified. Thereafter, she must reconsider the medical opinions of Drs. Lenkey, Saludes, Fino, and Altmeyer and render full findings as to the probative value of each opinion, as previously instructed, consistent with *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997), and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). The administrative law judge, in rendering her ultimate finding under 20 C.F.R. §718.202(a)(4), must place the burden of proof on claimant to establish the existence of pneumoconiosis by a preponderance of the reasoned and documented medical opinion

[5] The administrative law judge incorporated, by reference, her prior decision in this case. Decision and Order on Remand at 1.

evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Should the administrative law judge find that claimant has not established the existence of pneumoconiosis at Section 718.202(a)(4) on remand, she must then reconsider whether the evidence of record, as a whole, establishes the existence of pneumoconiosis in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-168 (4th Cir. 2000). If she finds the existence of pneumoconiosis established by a preponderance of all of the relevant evidence, she must determine, pursuant to 20 C.F.R. §718.203, whether the pneumoconiosis arose out of coal mine employment. She must then reconsider whether a preponderance of the evidence also establishes that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

On remand, the administrative law judge must fully abide by the Board's previous holdings and instructions, together with the foregoing, and explain her findings and rationale, in compliance with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Accordingly, the Decision and Order on Remand Granting Benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge